U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-C-A-L-, LLC

DATE: NOV. 25, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an assisted living home for seniors, seeks to employ the Beneficiary as an systems administrator. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification.[1] *See* Immigration and Nationality Act (the Act), section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Nebraska Service Center, denied the petition, concluding that the Petitioner did not establish that a *bona fide* job opportunity existed.

The matter is now before us on appeal. The Petitioner asserts the Director erred in finding that a *bona fide* job opportunity does not exist. Upon *de novo* review, we will dismiss the appeal.

I. LAW

Employment-based immigration is generally a three-step process. First, a U.S. employer must obtain a certified ETA Form 9089, Application for Permanent Employment Certification, (labor certification) from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Next, the U.S. employer files Form I-140, Immigrant Petition for Alien Worker, with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. If the Form I-140 is approved, the foreign national would apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

As required by statute, a labor certification, certified by the DOL, accompanies this petition.[2] By approving the labor certification, the DOL certified that there are insufficient U.S. workers who are

[1] In the original Form I-140, Immigrant Petition for Alien Worker, the Petitioner indicated that it was seeking classification of the Beneficiary as an alien with extraordinary ability. However, in response to the Director's first request for evidence (RFE), the Petitioner stated that it has made an error and requested that the petition be considered for classification as an advanced degree professional. The Director accepted the Petitioner's request; and as such, we will analyze the record according to the requirements of the advanced degree professional classification.

[2] We note that the Beneficiary did not sign the labor certification, which could be grounds to reject the petition. Per 20

able, willing, qualified, and available for the offered position. Section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the employment of a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. Section 212(a)(5)(A)(i)(II) of the Act. It is USCIS, however, that determines whether a foreign national meets the job requirements specified on a labor certification and the requirements of the requested immigrant classification. *See* section 204(b) of the Act (stating that USCIS must approve a petition if the facts stated in it are true and the foreign national is eligible for the requested preference classification); *see also, e.g., Tongatapu Woodcraft Haw., Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith,* 696 F.2d 1008, 1012-13 (D.C. Cir. 1983) (both holding that USCIS has authority to make preference classification decisions).

The priority date of a petition is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d). The priority date is used to calculate when the beneficiary of the visa petition is eligible to adjust his or her status to that of a lawful permanent resident. *See* 8 C.F.R. § 245.1(g). A petitioner must establish the elements for the approval of the petition at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. §§ 204.5(g)(2), 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

II. ANALYSIS

A. Record Does Not Establish a *Bona Fide* Job Opportunity

In this case, the Petitioner requests classification of the Beneficiary as an advanced degree professional. The priority date of the petition is January 6, 2015. The Director denied the petition finding that the Petitioner had not demonstrated that a *bona fide* job opportunity existed.

Labor certification employers must attest that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8). "This provision infuses the recruitment process with the requirement of a *bona fide* job opportunity: not merely a test of the job market." *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *7 (BALCA July 16, 1991) *(en banc)* (referring to the former, identical regulation at 20 C.F.R. § 656.20(c)(8)). USCIS may deny a petition accompanied by a labor certification that violates DOL regulations. *See Sunoco Energy Development Company*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (affirming a petition's denial where the accompanying labor certification was invalid for the geographical area of intended employment).

To provide an "opportunity to evaluate whether the job opportunity has been and is clearly open to qualified U.S. workers, an employer must disclose any familial relationship(s) between the foreign worker and the owners, stockholders, partners, corporate officers, and incorporators by marking

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C.F.R. § 656.17(a)(1), "DHS will not process petitions unless they are supported by an original certified ETA form 9089 that has been signed by the employer, alien, attorney and/or agent."

'yes' to Question C.9 on the ETA Form 9089." DOL, Office of Foreign Labor Certification, "OFLC Frequently Asked Questions & Answers," "Familial Relationships," at http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (accessed Nov. 8, 2016). "A familial relationship includes any relationship established by blood, marriage, or adoption, even if distant. For example, cousins of all degrees, aunts, uncles, grandparents and grandchildren are included. It also includes relationships established through marriage, such as in-laws and step-families." *Id.*

In determining the *bona fides* of a job opportunity, adjudicators must consider multiple factors, including but not limited to, whether a foreign national: is in a position to control or influence hiring decisions regarding the offered position; is related to corporate directors, officers, or employees; incorporated or founded the company; has an ownership interest in it; is involved in the management of the company; sits on its board of directors; is one of a small group of employees; and has qualifications matching specialized or unusual job duties or requirements stated in the labor certification. *See Modular Container*, 1991 WL 223955 at *8; *see* also 20 C.F.R. § 656.17(l) (describing the documents required to establish the existence of a *bona fide* job opportunity).

Adjudicators must also consider whether a foreign national's pervasive presence and personal attributes would likely cause a petitioner to cease operations in the foreign national's absence and whether the employer complied with regulations and otherwise acted in good faith. *Id.* A beneficiary's familial relationship or employment within a small group of employees is an important factor in determining the *bona fides* of a job opportunity. *See* 20 C.F.R. § 656.17(l)(5).

In the instant case, the Petitioner attested on the accompanying labor certification that "[t]he job opportunity has been and is clearly open to any qualified United States worker." Question C.9 on the ETA Form 9089 also asked: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" The Petitioner responded: "No."

Despite its negative response to Question C.9. on the labor certification, the record indicates a familial relationship between the Beneficiary and the Petitioner's sole owner. In response to the Director's RFE, the Petitioner disclosed that the Beneficiary is the brother of its sole owner. Further, the labor certification and Form I-140 state that the Petitioner employs five people. The record therefore identifies the Beneficiary as part of a small group of employees.

On appeal, the Petitioner states that it was "completely upfront with USCIS and made no misleading statements. Petitioner followed the regulations in performing diligent recruitment process and admitted the familial relationship when inquired by USCIS. There were never any actions to mislead the USCIS or the Department of Labor in this case." While the Petitioner maintains that the incorrect "no" response to question C.9. on the labor certification was an error and not an attempt to mislead, answering the question in this manner deprived the DOL from the opportunity to more closely examine whether a *bona fide* job opportunity exists and whether the job opportunity was clearly open to all qualified U.S. workers.

The Petitioner also asserts on appeal that its owner, the Beneficiary's brother, was not involved in the recruitment and hiring for the proffered position. The Petitioner included a letter from its owner and a second letter from Administrator. Both letters state that conducts all personnel recruitment for the Petitioner, that the Beneficiary's relationship to the Petitioner's owner did not influence the hiring process, and that there were no U.S. applicants for the proffered position.

However, despite the Petitioner's claims on appeal, the familial relationship between the Beneficiary and the Petitioner's sole owner, along with the small number of employees in the company, coupled with the Petitioner's negative response to C.9. on the labor certification, which deprived the DOL from the opportunity to examine the recruitment for the position, indicates that the Petitioner has not established a *bona fide* job opportunity in this matter.

Based on careful consideration of the *Modular Container* factors and the facts of the instant case, we find that the record does not establish the existence of a *bona fide* job opportunity.

B. Record Does Not Establish the Beneficiary's Qualifying Experience

Beyond the Director's decision, we also find that the Petitioner has not demonstrated that the Beneficiary has the experience required by the labor certification. A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. at; *see also Matter of Katigbak,* 14 I&N Dec. at 49.

Here, the labor certification requires a minimum of a master's degree in information systems or a related field, along with 36 months of experience in the proffered position of systems administrator.

Part K of the labor certification states that the Beneficiary was employed as a systems administrator for the following companies:

Employer	Dates of Employment	Hours per Week
	January 1, 2011, to December 31, 2013	40
	January 1, 2007, to October 1, 2014	30
	May 1, 2006, to November 30, 2009	20
	April 1, 2004, to March 31, 2010	40
	March 1, 2003, to January 31, 2007	20
	June 1, 2000, to March 31, 2003	30

While the record contains experience letters from all the claim previous employers, except for none of the submitted experience letters include a description of the Beneficiary's position, nor do they indicate the number of hours worked. A petitioner must support a beneficiary's claimed qualifying experience with letters from employers. 8 C.F.R. § 204.5(g)(1). The letters must include the employers' names, addresses, and titles, and descriptions of a beneficiary's experience. *Id.* The

letters must also include the hours worked such that USCIS can accurately calculate the duration of the Beneficiary's experience. Without such information, we cannot conclude that the Beneficiary has the 36 months of experience as a systems administrator required by the labor certification.[3] For this additional reason the petition cannot be approved.

C. Record Does Not Establish the Petitioner's Ability to Pay the Proffered Wage

Also beyond the Director's decision, we find that the record does not establish the Petitioner's ability to pay the proffered wage. A petitioner must establish its ability to pay the proffered wage from the priority date onward. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements

As noted above, the priority date for this petition is January 6, 2015. The proffered wage is $78,125 per year.

In this case, the record does not contain evidence that the Beneficiary has been employed and paid by the Petitioner or any regulatory prescribed financial documentation from the Petitioner for any year. Therefore, given the lack of any pertinent financial information, we find that the record does not establish the Petitioner's ability to pay the Beneficiary the proffered wage from the priority date onward. For this additional reason, the petition cannot be approved.[4]

III. CONCLUSION

The petition will be denied and the appeal dismissed for the above-stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the instant Petitioner did not meet that burden.

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[3] The number of hours worked is especially important in a case such as this where the labor certification states that Beneficiary worked for four different employers simultaneously, totaling 110 hours of work per week.

[4] Moreover, a check of California Secretary of State business records indicates that the Petitioner's status in California is "FTB Suspended," indicating that the Petitioner is no longer authorized to transact business. *See* http://kepler.sos.ca.gov/ (accessed November 8, 2016). This information raises concerns about the Petitioner's ability to pay the proffered wage and its continuing intent and ability to employ the Beneficiary in the certified position. The Petitioner must submit evidence of its continuing legal status to establish eligibility in any future filing.

ORDER: The appeal is dismissed.

Cite as *Matter of M-C-A-L-, LLC*, ID# 80824 (AAO Nov. 25, 2016)